IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 08/94

BETWEEN:
1. **Jimmy Toara as Administrator for the Estate of Toara Seule**
2. **Tompson Seule**

Applicants/Claimants

AND:
1. **Kalia Willie**
2. **Boa Willie Lelsey**

Respondents/Defendants

Date:	***Judgment 24th August, 2017***
Delivered:	***Monday 25th September, 2017***
Before:	***The Master Cybelle Cenac***
In Attendance:	***Roger Rongo holding papers for Daniel Yahwa for the Applicants/Claimants, Pauline Kalwatman with the PSO for the Respondent/Defendant, Kalia Willie***

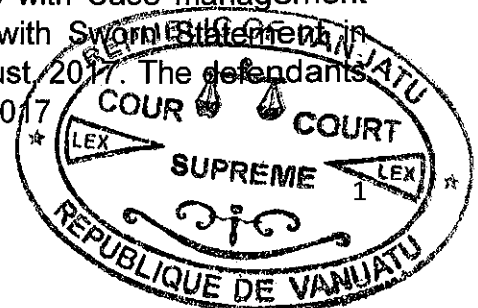
JUDGMENT

Headnote

Ending Proceeding Early – Application to Strike out Defence and Enter Judgement – CPR. 18.11, 6.8, 9.10 – Failure to comply with case management order – imposition of costs orders – reasonable excuse for failure to comply – order of court not to be self-executing – personal costs against lawyer

Introduction:

An Application to Strike out Defence for Non-Compliance with Case management order filed by the claimants on the 17th August, 2017 with Sworn Statement in support came before the court for hearing on the 24th August, 2017. The defendants filed their Reply by way of submission on the 23rd August, 2017.



Chronology of Events:

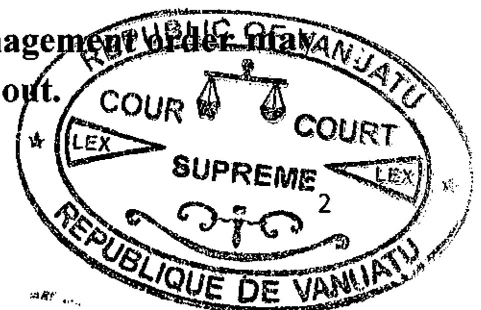
The Statement of Claim was filed on the 18th June, 2008 and the defence on the 19th February, 2009 and a mediation scheduled for the 8th December, 2016 which was adjourned to the 21st March, 2017 when it was again adjourned to the 6th June, 2017, both times on account of the absence of counsel for the defendants and her clients.

An Application was then filed on the 24th March, 2017 by the claimants for the court to enter judgement under CPR. 18.11. The defendants filed a Reply and after the court heard the parties on the 25th April, 2017 it declined to enter judgment on the basis that it found the fault for the delay to lie with counsel for the defendants and therefore issued personal costs against counsel in favour of the claimants. Mediation was again scheduled for the 6th June, 2017, and in its order, the court indicated that if the mediation did not proceed the matter would be treated as a case management conference and directions given.

On the 6th June the claimants indicated their intent not to proceed with mediation on the ground that they were now frustrated by the constant delays and excuses of the defendants and no longer felt inclined to pursue mediation. The case was given directions as follows:

IT IS HEREBY ORDERED:

1. That Statement of Claim to be amended to substitute Jimmy Toara as Administrator for the Estate of Toara Seule to be filed and served on or before the 30th June, 2017.
2. Standard Disclosure to be filed in compliance with the CPR by both parties on or before the 19th June, 2017.
3. That the claimants are to call 3 witnesses and the defendants are to call 3 witnesses.
4. That sworn statements for claimants witnesses is to be filed and served on or before the 7th July, 2017.
5. That sworn statements for defendant's witnesses is to be filed and served on or before the 28th July, 2017.
6. That each party is to file and serve a Chronology of Events and Statement of Issues on or before the 4th August, 2017.
7. That Skeleton Arguments to be filed and served by both parties on or before the 18th August, 2017.
8. That Pre-Trial Conference to be held on the 21st August, 2017 at 9 a.m.
9. That at the pre-trial conference parties are to indicate whether they intend to cross-examine witnesses, address filing of trial bundle by claimants and discussion of final trial costs.
10. That trial is estimated to last 2 days.
11. That claimants counsel is to pay the amount of VT10, 000 to the defendants as wasted costs.
12. **That failure to strictly comply with this case management order may result in either the claim or defence being struck out.**



In compliance with the said order the claimants filed their amended statement of claim on the 13th June, 2017, their lists of documents on the 2nd June, 3 sworn statements of evidence on the 6th July, chronology of events on 7th August and skeleton argument on the 14th August. Pre-Trial review was scheduled for the 21st August, 2017.

The claimants had substantially complied with the case management order save for having filed the chronology of events 3 days late. Up to the 21st August the defendants had failed to comply with any part of the order and had filed no application to file documents out of time.

Consequent upon this failure, counsel for the claimants filed Application to Strike out defence and enter judgment pursuant to paragraph 12 of the case management order of the 6th June and under CPR 18.11, and on the day for pre-trial review conference the court listed the hearing of the Application for the 24th August, 2017.

Following the filing of the said Application the defendants filed their chronology of events and issues on the 23rd August, skeleton argument on the 23rd August, Statement of disclosure on the 23rd August, further statement of disclosure on the 24th August and 1 sworn statement of evidence on the 24th August.

Jurisdiction to Strike out Defence and enter Judgment for the claimant

This is set out at Part 18.11 of the Civil Procedure Rules (CPR) as follows:

(1) This Rule applies if a party fails to comply with an order made in a proceeding dealing with the progress of the proceeding or steps to be taken in the proceeding.

(2) A party who is entitled to the benefit of the order may require the non-complying party to show cause why an order should not be made against him or her.

(3) The application:

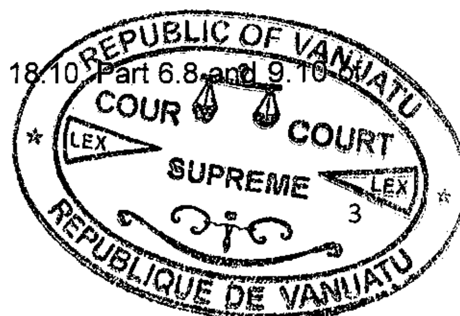
a) Must set out details of the failure to comply with the order; and
b) must have with it a sworn statement in support of the application; and
c) must be filed and served, with the sworn statement, on the non-complying party at least 3 business days before the hearing date for the applicants.

(4) The court may:

(a) give judgment against the non-complying party; or
(b) extend the time for complying with the order; or
(c) give directions; or
(d) make another order.

(5) This rule does not limit the court's powers to punish for contempt of court.

In these proceedings the court considered the application of Part 18.10, Part 6.8 and 9.10 of the CPR.



Submissions of Claimant:

The claimants' submission is simple and concise; that the defendants failed to comply with the case management order of the 6th June, 2017 and their conduct throughout in delaying the matter merited the court taking the serious step of striking out their defence and entering judgment for the claimants.

The claimants were well within their rights to make such an application. The submission filed by the claimants on the 30th August, 2017 set out its chronology of the matter since its commencement in 2008. Counsel pointed out that on 5 separate occasions from 2009 to 2017, borne out by the court's file, both defendants' counsel and the defendants were absent from proceedings without excuse, and coupled with the non-compliance of the case management order, it clearly showed a patent disregard for the court's proceedings and its orders. Counsel even went so far as to point out that in the court's order of the 6th June it clearly stated, in bold-type, that a failure to comply with the order may result in defence being struck out and judgment being entered.

Accordingly, the defendants were put on notice that there would be serious repercussions, if justifiable cause was not shown, to strike out its defence, and it was therefore incumbent on them to adhere strictly to the timetable.[1]

Submissions of Defendants:

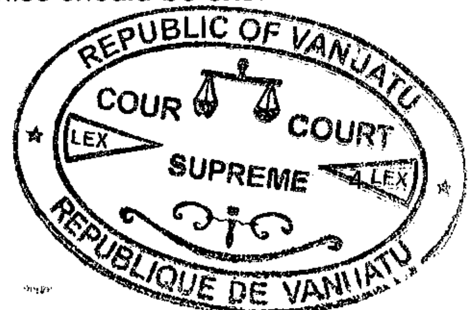
All the above referenced Parts of the CPR either state or presuppose, on the basis of natural justice, that a non-complying party is given the opportunity to provide justifiable reasons for his delay in not complying. In this instance, the defendants replied to the application only by way of submission and not by way of sworn statement, offering reasons for the non-compliance, and therefore, the court takes it that the defendants had no reasonable excuse for their failure to comply with the case management order of the court.

The defendants' submissions can be whittled down to the following two points:

1. That the defendants have now complied with all the case management directions; and
2. That there has been no prejudice suffered as the trial date has not been set and therefore the justice of the matter demands that it be listed for trial.

Discussion of the Law

As it relates to the facts of this Application the claimants are perfectly correct in requesting entry of judgment, both under the rules and in seeking to enforce that part of the court's order of the 6th June which warned of the consequences of failure to comply, but it would be remiss of me not to adequately address those areas of law that determine how my discretion to utilize my power to dismiss should be exercised.



[1] Republic of Vanuatu –v- Carlot [2003] VUCA 23, p. 7

Counsel for the claimants has referenced Republic of Vanuatu –v- Carlot[2] stating that the court was of the view that **"costs orders should be imposed against those who failed to meet obligations"** but this was not a suitable remedy in the present circumstances. By this, I presume counsel was suggesting that the imposition of costs orders was a suitable redress for breach of a case management order where the circumstances warranted it, that is, where the offending party offered up a reasonable excuse. Notwithstanding, counsel went on to distinguish this case from the present, by stating that in Carlot, the offending party was more favourably placed than the defendants in this instance, that is, the present defendants having offended the court's orders on not just 2 or 3 occasions but 6 separate occasions and had wasted costs imposed on 3 of those occasions.

Further, he went on to add that the defendants in this case offered no reasonable excuse for their delay, unlike in Carlot, and therefore the imposition of a cost order would be inadequate and only a strike out would suffice.

In contrast, the defendants submitted, for the court's consideration the same case, but used it to support their argument that the court was of the view that rules of court were not to operate in a way that was inconsistent with fundamental principles and that the justice of this case did not warrant a strike out.

For clarity and any avoidance of doubt for the future I will seek to elucidate the position of the court in the precedent case and demonstrate how the defendants fall outside its ambit.

In the case of Carlot, the presiding Judge struck out the claim for failure to disclose as ordered and in so doing failed to consider the following:

1. Whether non-disclosure was sufficient to warrant a striking out.
2. Not giving sufficient or proper weight to the reasons of the Respondent for failure to comply.
3. For failure to consider that the Respondent had a good defence on the merits, and
4. That his order was contrary to the provision of CPR 18.11.

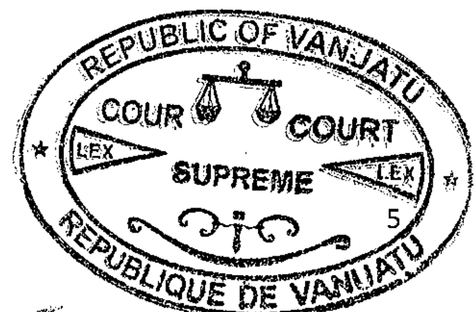
In Carlot, the court first looked towards the overriding objective outlined in the rules, stating that while the rules call for judicial case management it did not obviate the **"autonomy"**[3] of the litigant, particularly where the litigant to benefit from the court's intervention had not concurred[4] with the action taken by the court. This would undoubtedly be deemed inconsistent with the court's role to act justly. In other words, did the benefiting party properly invoke a step to cause the court to act? In Carlot, the Appeal court stated that that step would fall under CPR 18.11.

In the instant case, the step to strike out by the court was not self-initiated but initiated by the claimant by invoking Rule 18.11 as required, as compared with the precedent case.

[2] Ibid

[3] Supra; fn. 1, p.3

[4] Ibid



The fundamental point made by the Appeal court in Carlot, was that the presiding judge had not turned his mind **"to whether there was a reasonable excuse for the failure to comply, which [was] a necessary component of the exercise of the discretion..."**[5] The court admitted the submission of the Appellant, that rule 6.8 could not be read in isolation of rule 18.11, that is, while both rules afford the power to strike out by the court, in both instances the court was obligated to provide the offending party with an opportunity to be heard as to its reason for the failure, and consequently, in spite of a warning to strike out in an order, it did not dispossess the offending party of that right to be heard. The court was therefore of the opinion that although such an order contained an unless provision, that provision could not be self-executing without further enquiry.

Notwithstanding, the court did make the crucial point that while a warning could not be self-executing it was **"important evidential material"**[6] and would go to increasing the obligation on the offending party to comply with the timetable, and that any reasons for non-compliance would have to be **"reasons of real substance which in the interest of justice [satisfied] the Judge that the failure to meet the terms of the order were not without reasonable excuse."**[7]

In this case the defendants offered no evidence by way of sworn statement as to substantial reasons for their non-compliance and therefore counsel for the defendants cannot seek to call to her aid the case of Carlot when her clients clearly fall outside its parameters. The claimants counsel properly filed his application under Rule 18.11 to invoke the court's discretion and the defendants were given the opportunity and had more than sufficient time to put in a response with sound reasons but failed to do so.

In Carlot, the Appeal court obviously felt quite strongly that the Appellant had been pushed from the seat of justice most unceremoniously without his reasons being properly considered, more particularly because he had quite a good defence. Whilst the court was of the view that the rules are important in both aiding the court and litigants and are to be observed, it felt that this could be achieved by imposing costs orders for those who fail to meet their obligations and that courts should not **"deliver justice on a knee jerk basis"**[8] as the **"principles of our legal system must not be sacrificed to efficiency especially when there may be a reasonable excuse for an omission."**[9]

On the other hand, this court is of the view that a balance must be struck between the courts and the litigants, where the resources of the court are not stretched to capacity for the unjustified delays of counsel and the litigants and used as a crowbar to ensure the doors of justice always remain open to them no matter their omission

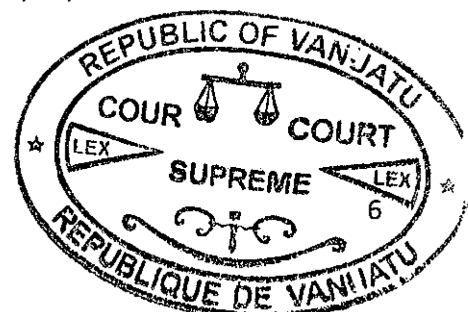
[5] SEE: CPR 6.8(2) where the rule specifies that where a party or his lawyer has failed to comply with an order the court may strike out the claim or defence but not before allowing the party to put forward a **reasonable excuse** for the failure and Supra; fn. 1, p.6

[6] Ibid, p.7

[7] Ibid

[8] Ibid

[9] Ibid



or error, which can inevitably lead to an abuse of the court's procedures and processes.

The overriding objective requires that in dealing with cases justly, consideration must be had to saving expenses and allocating an appropriate share of the court's resources proportionate to the importance and complexity of the case and the amount of monies involved etc.

This is a simple case of trespass and/or boundary dispute and consequent damage to property amounting to approximately VT5 million or less. The defendants have substantially admitted to the claim and it behooves the court to see its resources stretched in this manner from 2008 to the present, nearly 9 years, with little to no progress beyond the pleadings, due largely to consistent delays by the defendants and their counsel.

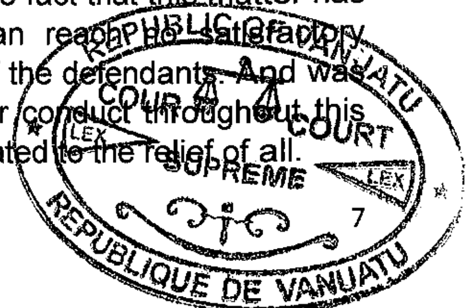
By the court's assessment of the file this matter has come before the court on 19 occasions and for mediation on 5. Of those 24 times the matter has been called for either hearing or mediation, the defendants and/or their Attorney have been absent 12 times and the claimants and/or their Attorneys only twice. From the commencement of the case to date the defendants and/or their Attorney have paid approximately VT50,000 in wasted costs, suggestive of delays occasioned by the defendants. The defendants failed to file their defence within the time limits of the rules; they breached the restraining order against them and are in breach of the court's case management order of the 6th June. In three of the orders made by the court, the court inserted a warning clause for failure of the defendants to comply, suggestive of a pattern of behaviour evident to the court, which it wished to curtail.

Counsel for the defendants sought to remedy this breach of the case management order, not by filing an application within time to request an extension to file all documents out of time, giving reasons for the delay and the request, but rather, by shoddily attempting to comply with the said order in an effort to present it as a feasible ground to permit the matter to proceed unfettered. Counsel essentially attempted to nullify the possible effect of the Application of the claimants or else make some kind of contrition, without proper excuse, by the late filings.

Prejudice

Defendants counsel has stated that the claimants have suffered no prejudice as a trial date has not been set. She failed to take into account that a trial was scheduled for the 19th October, 2016 and on the agreement of both parties the matter was referred to mediation which was scheduled for the 8th December, 2016 and then the 21st March, 2017, both of which the defendants and their Attorney were glaringly absent.

Counsel for the defendants has failed to take account of the fact that this matter has been ongoing since 2008 and nearly 9 years later can reach no satisfactory conclusion, due in large part to the delays and breaches of the defendants. And was it not for the apparent bad faith of the defendants in their conduct throughout this matter this case could have long been adjudicated or mediated to the relief of all.



It is not enough for counsel to say that they have complied, albeit lately. It is almost inherent in a 9 year delay that prejudice would likely abound and the claimants have been denied the possibility of finality being brought to bear in this matter and possible favourable judgment, much sooner than later, based on the admissions of the defendants.

I am always greatly disturbed by the casualness of counsel in this jurisdiction of their representation of clients. Attorneys must always seek to zealously represent their clients and work with studied aplomb to arrive at a speedy and just conclusion for their clients. This has not been the case here.

I note that throughout this case there appears to be a disregard on the part of not just counsel for the defendants but the defendants themselves in actively pursuing this matter, and therefore, I cannot lay the blame for any failures squarely on the shoulders of all the counsel who have preceded Ms. Kalwatman, as I see that they should rest equally with the defendants who appeared to be moving from pillar to post throughout this matter with no definitive stance taken on the way forward.

Had the defendants not so often aborted previous attempts at mediation I honestly believe the parties could have arrived at a conclusion long ago as this is a matter which was sorely in need of and could have benefited greatly from mediation.

Defence of Merit

While it is not obligatory for the court to assess the merits of the defence, I think it necessary to examine the intrinsic worth of the defence, particularly in the absence of reasons being offered by the defendant to see whether this might be a final limb open to the defendants in allowing the court to exercise its discretion in their favour.

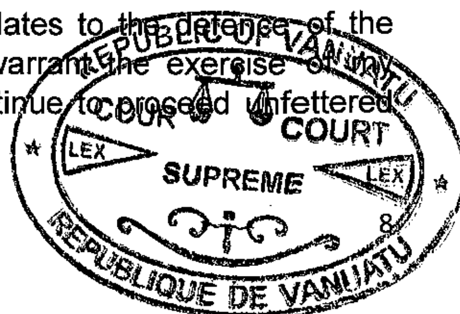
The defendants in reply to paragraph 5 of the claimants claim admitted their part in destroying the claimants' fence, and though they denied the damage therein particularized, the fact upon which the damaged hinged was admitted.

The defendants admitted at paragraph 7 of their defence in reply to paragraph 7 of the claimants claim that they did issue threats though they denied that the said threats were continuing as alleged.

The defendants admitted at paragraph 8 of their defence in reply to paragraph 8 of the claimants claim that they did damage properties, albeit that they denied the quantum of damage claimed.

The claimants claim being substantially for trespass and consequent damage, and the defendants seeming to have admitted to the actual trespass as it related to entry on to the property to damage the fence of the claimants etc., with their only quarrel appearing to relate to the question of damage suffered, if at all, and/or quantum.

That being the above assessment of the court as it relates to the defence of the defendants, I can see no viable defence present to warrant the exercise of my discretion in this matter to allow the defendants to continue to proceed unfettered.



and the only issue open to the defendants to be heard on would be the question of assessment of damages.

Conclusion

Therefore, in all the circumstances I cannot allow the defence of the defendants to stand. I allow the application of the claimants on the following grounds:

1. That there was substantial non-compliance with the court's case management order of the 6th June, 2017, compounded by a complete disregard for the court's warning contained in the said order.
2. That the defendants offered no reasons for the failure to comply.
3. That the defendants have shown a thorough disregard for adhering to court rules and orders.
4. That the defendants defence substantially admitted the trespass and therefore consequent damage.

Costs

Claimants' counsel requested indemnity costs in the sum of VT20, 000. Defendants counsel objected on the ground that they had now complied with the case management order and that there had been previous wasted costs orders made against counsel personally.

Counsel for the claimants offered no specific reasons for the request for indemnity costs and I will not presume to guess at those reasons, and therefore I find no grounds for granting such a request.

As I almost never make orders for costs in the cause I will make an order for specific costs for this application in favour of the claimants in the amount of VT15, 000.

As I am minded to make the order a personal costs order against counsel for the defendants under CPR 15.25(5), I will give her an opportunity at the next hearing to explain why such an order should not be made.

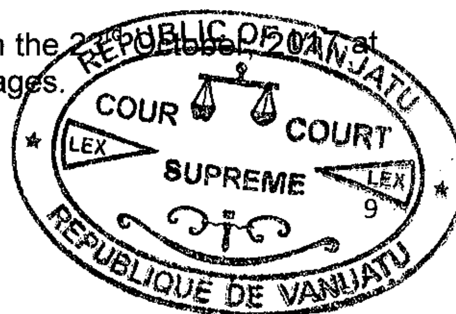
My order is as follows:

1. Application granted and defence struck out under CPR 6.8(2) and 9.10(1)(b) & (2)(c).

2. Judgment entered for the claimants under CPR 18.11(4)(a) on an amount to be assessed by the court.

3. That the assessment of damages if opposed will be scheduled before another Judge of the court.

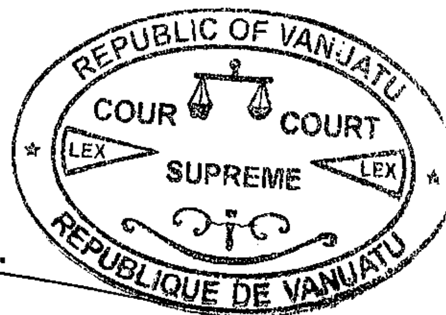
4. That a conference will be held before the Master on the 2[illegible]th October, 2017 at 2 p.m. to give directions on the assessment of damages.



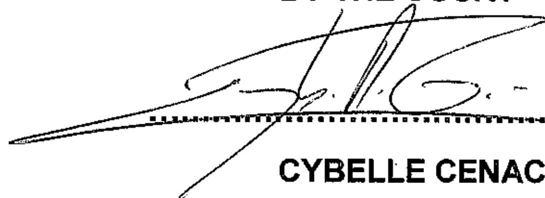
5. That costs in favour of the claimants in the amount of VT15, 000 to be paid no later than 14 days after the hearing to address the responsible payee.

6. That the question of whether costs are payable by the defendants or the defendants counsel under CPR 15.25(5) in this matter is to be determined at the hearing of the 23rd October, 2017 at 2 p.m.

7. That costs of the cause is awarded in favour of the claimants to be agreed or otherwise taxed.



BY THE COURT



CYBELLE CENAC

MASTER